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NO. 83-2074

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HAZEL A. HESTER,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Appellee.

On Appeal from the United States Court of Appeals for the Federal Circuit

JURISDICTIONAL STATEMENT

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Questions Presented

1. Whether the Merit Systems Protection Board of the Food and Drug Administration violated appellants procedural due process right under the Fourteenth Amendment of the Constitution of the United States in sustaining the removal of the appellant on the basis of a charge never raised in the Agency's notice of the proposed removal?

2. Whether the Merit Systems Protection Board of the Food and Drug Administration violated appellants procedural due process right of the Fourteenth Amendment of the Constitution of the United States when in finding that appellant had made false statements on employment applications where the presiding official's conclusion rested upon an erroneous interpretation of the law?

3. Whether the Merit Systems Protection Board's determination that removal is the appropriate penalty where the underlying charges cannot be sustained as a matter of law violates appellants substantive due process right of the Fourteenth Amendment and equal protection right of the Fifth Amendment?

4. Whether the Merit Systems Protection Board of the Food and Drug Administration violated appellants substantive Due Process Right of the Fourteenth Amendment and the Equal Protection Right of the Fifth Amendment of the Constitution of the United States when it failed to demonstrate an actual nexus between the alleged misconduct and appellants performance and efficiency of services in her removal and rendered a penalty which far outweighed the act?

5. Whether the agency failed to produce evidence of intent to defraud the government with regard to appellant's enrollment in health and life insurance benefits programs and the presiding official committed error by impermissibly shifting the burden of proof violated appellants Procedural Due Process Right under the Fourteenth Amendment?

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NO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HAZEL A. HESTER,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Appellee.

On Appeal from the United States Court of Appeals for the Federal Circuit

JURISDICTIONAL STATEMENT

Hester v. Department of Health and Human Services, Merit Systems Protection Board Initial Decision, Docket Number NY07528110345, October 27, 1981. Officially unreported.

Hester v. Department of Health and Human Services, Merit System Protection Board, Final Order, Docket Number NY07528110345, July 6, 1983. Officially unreported.

Hazel A. Hester, the appellant, appeals from the final judgment of the United States Court of Appeals for the

Federal Circuit, dated March 21, 1984, holding that the Merit Systems Protection Board of the Food and Drug Administration's actual conclusion to fire appellant from employment was supported by substantial constitutional evidence.

Opinions Below

The opinion of the United States Court of Appeals for the Federal Circuit which appears in the appendix hereto is not reported. (See App2a)

Jurisdiction

The judgment of the United States Court of Appeals of the Federal Circuit confirming the removal of appellant from her job was entered on March 21, 1984.

This appeal is being docketed in this Court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1252 and 28 U.S.C. § 1254.

Constitutional Provisions and Rules

Fourteenth Amendment, United States Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any persons of life, liberty, or property, without due process of law; nor deny to

any person within its jurisdiction the equal protection of the law.

Fifth Amendment, United States Constitution:

No person shall be . . . deprived of life, liberty, or property, without due process of law; . . .

Subchapter II—Forfeiture of Annuities and Retired Pay
§ 8311. Definitions:

For the purpose of this subchapter . . .

(2) "annuity" means a retirement benefit including a disability insurance benefit and the dependent's or survivor's benefit under subchapter II of chapter 7 of title 42, and the monthly annuity under section 228b or 228e of title 45, payable by an agency of the Government of the United States or the government of the District of Columbia on the basis of service as a civilian employee and other service which is creditable to an employee toward the benefit under the statute, regulation, or agreement which provides the benefit, but does not include . . .

Subchapter III—Civil Service Retirement

§ 8331. Definitions . . .

Civil Service Reform Act of 1978

5 U.S.C. § 7513 (b) (1) as amended . . .

is intended to reduce the degree of detail now sometimes required in order to avoid reversal on procedural grounds. The agency must still tell the employee the reasons for the proposed action in sufficient detail to allow the employee to make an informed reply . . .

5 U.S.C. § 7513. Cause and procedure

> (a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of service . . .

Raising the Federal Question

Appellant raised the claim in the proceedings before the United States Court of Appeals for the Federal Circuit. There appellant requested to reinstate her job on the ground that 5 U.S.C. § 8311 and 5 U.S.C. § 8331 and 5 U.S.C. § 7513 were violated, and that said erroneous interpretation of the law violated appellant's Fourteenth Amendment and Fifth Amendment right of the United States Constitution as set forth herein.

Statement of the Case

Petitioner Hazel A. Hester was employed by the Food and Drug Administration (FDA) of the Department of Health and Human Services in the position of Office Services Superivsor, GS-7, when the FDA (hereinafter also the Agency) proposed her removal by letter to her from her supervisor on May 20, 1981. Ms. Hester, first employed by the Agency on August 20, 1972, had, at the time of her proposed removal, *thirty-two years of* government service in various federal agencies. In addition, she had received numerous commendations over her tenure as a government employee.

Previously employed by the Department of the Army in the Procurement Agency, Ms. Hester, on November 19,

1971, had received a notice of Reduction in Force because of the proposed disestablishment of the Procurement Agency. The following year, on March 30, 1972, Ms. Hester was notified of a specific Reduction in Force which stated that she would be separated as of May 30, 1972. In preparation for her proposed separation and having received notice that she could apply for a retirement annuity on the basis of discontinued service, Ms. Hester, on May 8, 1972, filed formal application for retirement. Her date of effective separation was June 29, 1972.

Before receiving any annuity benefits from the Civil Service Commission, Ms. Hester sought other federal employment and received a career reinstatement appointment with the Food and Drug Administration. At the time of her reinstatement in August of 1972, Ms. Hester filled out a number of federal government forms and received still others filled out by the Agency. The Food and Drug Administration was fully aware of her status as a former government employee who had applied for a retirement annuity. As a now active employee, Ms. Hester applied for benefits under the Federal Employees Health Benefit Program and Federal Employees Life Insurance Program. In July of 1979, Ms. Hester received a promotion to EAM Project Planner, GS-7, and was later assigned to the position of Office Services Supervisor.

Sometime in 1973, Ms. Hester began to receive annuity payments from the federal governments' Civil Service Retirement Fund. The periodic payments continued over a period of years until the Office of Personnel Management informed Ms. Hester that its records revealed that she was in receipt of an overpayment of annuity benefits. This letter, dated April 2, 1981, informed Ms. Hester that she could repay the overpayment in a lump sum or, if she qualified, in installment payments. Further, the letter stated that she had thirty days to dispute the debt or its

amount. The Food and Drug Administration, upon receipt of a copy of the April 2, 1981 letter to Ms. Hester, notified her of its intent to remove her from her position with the FDA.

Through the May 20, 1981 Notice of Proposed Removal, Ms. Hester was advised that the Agency had lodged three specific charges against her: (1) that she had enrolled in the Federal Employees Health Benefit Program while already receiving health benefits as a retiree in violation of regulations prohibiting dual enrollments; (2) that she had enrolled in the Federal Employees Life Insurance Program as an active employee while also receiving coverage as a retired employee; and (3) that she made false statements on Form SF-171 on two occasions in reply to questions of whether she had a pending application for retirement or retainer pay, pension, or other compensation based upon military, Federal civilian or District of Columbia service. In addition, the agency specifically proposed her removal.

Following petitioner's reply to the Notice, the Agency, on June 29, 1981, by letter, notified Petitioner that the original charges proposed by the Agency were affirmed and that she would be removed as of the close of business on July 10, 1981.

Hazel A. Hester filed a timely Petition for Review of Agency Decision on July 24, 1981, with the Merit Systems Protection Board (MSPB or Board). Pursuant to regulation, a hearing was convened before a Presiding Official of the Board on September 22, 1981. Following a one-day hearing, Presiding Official Arthur Joseph rendered his Initial Decision, Number NY07528110345, on October 27, 1981, in which he found that the Agency had met its burden of proof with regard to four charges: receiving health benefits to which she was not entitled, receiving life in-

surance benefits to which she was not entitled, receiving annuity payments to which she was not entitled, and falsification of two employment applications, SF-171. Additionally, the Presiding Official found that because the charges were grave, removal was the appropriate penalty.

Having been notified by the Presiding Official of her right to appeal the Initial Decision within thirty-five days, Ms. Hester filed a timely Petition for Review of Initial Decision to the Merit Systems Protection Board, Washington, D.C. On July 6, 1983, the MSPB rendered its Final Order, summarily denying Ms. Hester's Petition. The Board also notified her of her right to seek judicial review within thirty days of receipt of the Board's Final Order. Ms. Hester received the Board's Order of July 13, 1983, and on August 9, 1983, petition was filed in the United States Court of Appeals for the Federal Circuit, Washington, D.C. On March 21, 1984 the Final Order of the MSPB was affirmed. The instant petition was filed in the United States Supreme Court.

I. The Merit Systems Protection Board of the Food and Drug Administration violated appellants procedural due process right under the Fourteenth Amendment of the Constitution of the United States in sustaining the removal of the appellant on the basis of a charge never raised in the Agency's notice of the proposed removal.

Federal statutes governing adverse employment actions against federal employees in the competitive service specifically provide that an agency seeking to remove an employee must provide advance notice of the reasons for the agency's proposed action. A removal which is founded upon charges not preferred by the agency is erroneous as

a matter of law and must be overturned. *Albert* v. *Chafee,* 571 F.2d 1063 (9th Cir. 1977). *See also*: *Securities & Exchange Commission* v. *Chenery Corporation,* 322 U.S. 194 (1947).

In the instant matter, the Food and Drug Administration specified three charges against Appellant Hazel Hester. However, the Presiding Official of the Merit Systems Protection Board in his decision found four specific charges against the Appellant and sustained the Agency's removal of Ms. Hester on all four charges, including the one not contained in the Agency's Notice of Proposed Removal.

Failure of an agency to specifically enumerate a charge on which the agency proposes an adverse action violates the statutory requirement that the agency state its specific reasons. Moreover, the failure does not stand in the posture of a claim of lack of detail but rather constitutes a lack of fundamental due process, a deficiency of such magnitude that the entire decision must be overturned. *Johnston* v. *Government Printing Office,* 5 MSPB 376, 379 (1981). In *Johnston,* the Merit Systems Protection Board held that where an agency has specifically enumerated multiple charges against an employee, a decision which reaches into the evidentiary explanation of the notice of proposed action to find some other, but not enumerated, charge violates the "basic procedural rights of employees" even if the "discovered" charge could have been sustained on its own merits. *Id.* at 377. To hold otherwise, as Appellee vigorously asserts, is to accept the proposition that the enumerated charges in the agency's notice are of no moment and that procedural due process may be satisfied by the dispersal of the actual, and perhaps more significant, charges in the discussion of the evidentiary support for the enumerated charges. Not only is such a position offensive to the fundamental tenets of due process

but it relegates the notice of proposed adverse action to an elaborate, semantic game of "bait and switch." The employee, thus, would be forced to await the decision of the Presiding Official to discover the actual charges preferred by the agency.

Through its own argument, then, Appellee has conceded that the unenumerated "fourth charge" was the critical reason for the proposed removal. Therefore, the failure to specifically enumerate the admittedly critical charge, while the agency provided full detail of the less significant charges, makes the procedural violation especially egregious. An agency clearly violates procedural due process by relying upon less significant charges for its action while actually relying upon some other, critical charge. As a result, an employee, attempting to meet the stated charges is then effectively misled as to the actual reasons for the agency's action and may fail to adequately address the unenumerated, and more serious charge, to the employee's detriment. This fundamentally unfair game of bait and switch hardly results in the informed reply anticipated by Congress and would set dangerous precedent for future agency actions.

Therefore Appellants' procedural due process right under the Fourteenth Amendment of the Constitution of the United States was violated.

II. The Merit Systems Protection Board of the Food and Drug Administration violated appellants procedural due process right of the Fourteenth Amendment of the Constitution of the United States when in finding that appellant had made false statements on employment applications where the presiding official's conclusion rested upon an erroneous interpretation of the law.

Petitioner Hazel Hester was charged by the Agency with making two false statements on employment applications when she answered "no" to identical questions inquiring whether she had a pending application for or was receiving retirement or retainer pay, pension, or other compensation based upon military, federal civilian or District of Columbia Government service. At the time Petitioner answered each question she was in receipt of an annuity from the Civil Service Retirement Fund.

The error as a matter of law rests on the Presiding Official's erroneous interpretation that the questions to which Petitioner allegedly provided false statements were applicable to annuities from Civil Service. In fact, under governing statutes and case law, annuities do not fall within the scope of the inquiry of the question. *Dismuke* v. *United States,* 297 U.S. 167, *reh. denied,* 297 U.S. 728 (1936); 5 U.S.C. § 8331 *et seq.*

Therefore, the erroneous construction of 5 U.S.C. § 8331, *et seq.* constitutes a lack of fundamental due process.

III. The Merit Systems Protection Board's determination that removal is the appropriate penalty where the underlying charges cannot be sustained as a matter of law violates appellants substantive due process right of the Fourteenth Amendment and equal protection right of the Fifth Amendment.

The Presiding Official's decision to sustain the Agency's removal of Ms. Hester cannot stand as it is erroneously predicated upon a finding that the Agency had carried its burden with respect to four charges. As was demonstrated earlier, the Presiding Official's determination that Ms. Hester was charged by the Agency with fraudulent receipt of an annuity is erroneous as a matter of law. Secondly, the determination that Ms. Hester falsified employment applications has also been shown to be erroneous as a matter of law.

Where a decision to impose a penalty is based even in part upon a premise that was later proven to be erroneous, the decision with regard to the penalty must be reversed and remanded for a proper determination. *Francisco* v. *Campbell,* 625 F.2d 266, 270 (9th Cir. 1980). *See also*: *Meehan* v. *Macy,* 425 F.2d 472 (D.C. Cir. 1969); *Lateef* v. *Department of Interior,* 6 MSPB 557, 558 (1981).

Finally, since the Agency admitted on the record that the decision to take action against the Petitioner was made only on a charge not contained in the Notice of Proposed Removal, the penalty decision violates Agency regulations which require that penalties be determined only in relation to specific violations. As a result, the Agency determination of removal must be overturned as improper. *See*: 45 C.F.R. § 73.735-1201(b); *Young* v. *Hampton,* 568 F.2d 1253, 1264 (7th Cir. 1977).

Therefore, the Merit Systems Protection Board's determination that removal is the appropriate penalty where

underlying charges cannot be sustained violates appellants Substantive Due Process Right and Equal Protection Right of the Fifth Amendment.

Furthermore, it seems harsh that the appellant, who had worked for the United States Government in various capacities and had become an expert in her job capacity, should suffer such a harsh punishment.

The record is replete in that she had received numerous commendations over her tenure as a government employee. Of what use were these commendations in her hour of need?

It seems that upon her first violation "the book was thrown at her".

This, appellant claims is that the punishment does not fit the violation. This, appellant claims that her constitutional rights, as aforestated, have been violated as set forth herein. This, appellant claims that the United States Government may well have punished her but not removed her forever from service within the government and to which government she had devoted a lifetime of service.

IV. The Merit Systems Protection Board of the Food and Drug Administration violated appellants substantive Due Process Right of the Fourteenth Amendment and the Equal Protection Right of the Fifth Amendment of the Constitution of the United States when it failed to demonstrate an actual nexus between the alleged misconduct and appellants performance and efficiency of services in her removal and rendered a penalty which far outweighed the act.

An agency seeking to remove a federal employee must demonstrate a nexus between the alleged misconduct and either the performance of the employee or the efficiency of the service and must do so by a preponderance of the evidence. 5 U.S.C. § 7513(a) (1982); *Merritt* v. *Department of Justice,* 6 MSPB 493 (1981). In the instant matter, the Agency, although on notice of and investigating alleged misconduct, promoted the Appellant and eventually assigned her supervisory duties. Futhermore, the Agency admitted that Appellant's performance was good and her work record was also good.

Despite the Agency's bald allegations of mistrust and suspicion of the Appellant in light of the charges against her, the vital nexus cannot be found. Since the Agency admitted to Appellant's good performance and presented no evidence that the Agency had been adversely affected, the decision cannot be supported by substantial evidence. *See*: *Gloster* v. *General Services Administration,* slip opinion, No. 82-1774 (D.C. Cir. October 28, 1983).

Therefore, the failure of the agency to demonstrate an actual nexus constitutes a lack of fundamental substantive due process and equal protection.

V. The agency failed to reproduce evidence of intent to defraud the government with regard to appellant's enrollment in health and life insurance benefits programs and the presiding official committed error by impermissibly shifting the burden of proof violated appellants Procedural Due Process Right under the Fourteenth Amendment.

In contravention to the requirement in governing federal regulations and case law that the Agency must prove every element of its charge by a preponderance of the evidence, the Agency made only a bare bones presentation, showing only that Petitioner had filed enrollment applications for coverage under the health and life insurance programs. 45 C.F.R. § 73.735-1201(b); *Douglas* v. *Veterans Administration,* 5 MSPB 313 (1981). However, since the Agency contended that Appellant filed such applications with intent to defraud the government, but presented no evidence of intent, the charge cannot be sustained.

Despite the Agency's failure to present evidence on this element, the Presiding Official impermissibly shifted the burden of proof to the employee in order to find the requisite intent. *Ford* v. *United States Department of Housing and Urban Development,* 450 F. Supp. 559 (N.D. Ill. 1978).

Therefore, the agency violated the appellant's procedural due process right under the Fourteenth Amendment by failing to produce substantial evidence of intent to defraud the government and impermissibly shifting the burden of proof.

CONCLUSION

Since the Initial Decision of the MSPB cannot be sustained because of substantial errors of both fact and law, the order of the Board and the underlying Agency action are clearly arbitrary and capricious and not in accordance with law. Consequently, the Appellant respectfully prays that this Honorable Court:

1. Grant her petition for review;

2. Set aside the MSPB's order affirming the removal of the Appellant;

3. Order the Appellee to reinstate the Appellant with retroactive back pay and all beneficial entitlements;

4. Award Appellant her reasonable costs and attorneys' fees; and

5. Grant such other and further relief as the Court deems necessary, just, and proper.

Respectfully submitted,

MARTIN GELBER
Counsel of Record
GELBER & KRUVANT
Attorneys for Appellant

Dated: June 12, 1984

[APPENDICES FOLLOW]

APPENDIX A

Notice of Appeal to the Supreme Court of the United States

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Civil Action No. 83-1380

HAZEL A. HESTER,

Plaintiff,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

Notice is hereby given that Hazel A. Hester, the plaintive above-named, hereby appeals to the Supreme Court of the United States from the final order dismissing the complaint entered in this action on March 21, 1984.

This appeal is taken pursuant to 28 U.S.C. §1252, 28 U.S.C. §1254, Amendment V, United States Constitution and Amendment XIV, United States Constitution.

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Dated: June 12, 1984

APPENDIX B

Decision of the United States Court of Appeals for the Federal Circuit

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1380

HAZEL A. HESTER,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

DECIDED: March 21, 1984

Before BALDWIN, *Circuit Judge*, COWEN, *Senior Circuit Judge*, and KASHIWA, *Circuit Judge*.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board (MSPB) sustaining the agency's removal of petitioner for violating the agency's Standard of Conduct as set forth in 45 C.F.R. §73.735-101, is *affirmed*.

Appendix B

OPINION

In March, 1972, petitioner was removed from the Army pursuant to a reduction-in-force. At that time petitioner applied for and received an annuity as well as life and health insurance benefits as a retiree. When petitioner was reinstated with the Food and Drug Administration (FDA) on August 20, 1972, she did not cancel her annuity or her insurance benefits as a retiree. Petitioner, however, also enrolled in the insurance plans for active employees.

While petitioner was receiving annuity payments, she denied receiving retirement pay in response to a question (number 34) on two SF-171 forms. As a result of these events, petitioner was removed from her position with the FDA for violating the agency's Standards of Conduct as set forth in 45 C.F.R. §73.735-101. She appealed her removal to the MSPB which sustained the agency's action.

Petitioner challenges the MSPB's decision on procedural grounds. She argues that whereas the agency's notice of proposed removal contained only three charges against her ((1) receiving dual health insurance benefits, (2) receiving dual life insurance benefits, and (3) falsifying two employment applications), the MSPB sustained the agency's action specifically on the basis of a fourth charge: fraudulent receipt of annuity payments. Because this fourth charge was not included in the agency's notice, petitioner argues that the notice she received violated 5 U.S.C. §7513(b)(1) (Supp. III 1979), which requires that the employee be given the "specific reasons for the proposed adverse action." We disagree and conclude that the FDA gave petitioner adequate notice that she was charged with the fraudulent receipt of annuity payments in addition to the three enumerated charges.

Appendix B

The notice received by petitioner explained that under 5 U.S.C. §8344(1), her reinstatement disqualified her from receiving annuity benefits after August 20, 1972. In addition, the notice stated the amount of overpayment that petitioner had recieved, described the annuity as one to which she was not entitled, and charged that petitioner knew or should have known that she was not entitled to receive both a salary and an annuity check. These statements clearly put petitioner on notice that she wrongfully received annuity payments. We also note that 5 U.S.C. §7513(b)(1) was recently amended to reduce the amount of detail an agency must include in a removal notice. *Brewer* v. *United States Postal Service,* 647 F.2d 1093, 1097 (Ct. Cl. 1981).

Petitioner also argues that she did not deny receiving an annuity in response to question 34 on the SF-171 forms because that question does not refer to annuities. Therefore, the MSPB should not have sustained the agency's charge that she falsified two employment applications. This argument is not supported by the relevant statutory sections. For example, 5 U.S.C. §8311(2), on which petitioner relies, specifically defines "annuity" as a retirement benefit.

Petitioner's third allegation is that the agency did not demonstrate a nexus between her removal and the efficiency of the service. 5 U.S.C. §7513(a). Whether an employee's removal will promote the efficiency of the service is a matter largely within the agency's discretion. *Masino* v. *United States,* 589 F.2d 1048 (Ct. Cl. 1978). In the present case, the presiding official agreed with the agency that petitioner's misconduct brought into question her ability to perform her duties since she also had fiduciary responsibilities at the agency.

Appendix B

Finally, petitioner challenges the MSPB's factual findings. After a thorough review of the record we are convinced that there was more than substantial evidence to support the MSPB's factual conclusions. For the foregoing reasons, the MSPB's decision is affirmed.

APPENDIX C

Judgment of the United States Court of Appeals for the Federal Circuit

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 83-1380

HAZEL A. HESTER,

Petitioner,

v.

DEPARTMBENT OF HEALTH AND HUMAN SERVICES,

Respondent.

JUDGMENT

On appeal from the Merit Systems Protection Board this cause having been heard and considered, it is ordered and adjudged: AFFIRMED.

Dated: March 21, 1984

ENTERED BY ORDER OF THE COURT

GEORGE E. HUTCHINSON
Clerk

APPENDIX D

Initial Decision of the Merit Systems Protection Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

HAZEL A. HESTER,

DEPARTMBENT OF HEALTH AND
HUMAN SERVICES.

Initial Decision Number NY07528110345

Date: October 27, 1981

INTRODUCTION

Hazel A. Hester ("appellant") filed a timely petition for appeal with the Board from a decision by the Food and Drug Administration, Newark District Office, Newark, New Jersey ("the agency") to remove her from the position of Office Services Supervisor, GS-7, effective July 10, 1981.

JURISDICTION

When removed, appellant was an employee in the competitive service, who was not serving a probationary or trial period under an initial appointment. She is, therefore, entitled to appeal her removal to the Board. 5 U.S.C. 7701(a), 7511(a)(1)(A), 7512(1), and 7513(d) (1978).

Appendix D

ANALYSIS AND FINDINGS

Appellant's removal was proposed and sustained for acts violating the agency's standard of conduct at 45 C.F.R. 73.735-101 which states, in pertinent part:

> "To assure that the business of the Department of Health and Human Services (HHS) is conducted effectively, objectively, and without improper influence or the appearance of improper influence, employees and special Government employees must be persons of integrity and must observe high standards of honesty, impartiality, and behavior. They must not engage in any conduct prejudicial to the Government and must avoid conflicts of private interests with public duties and responsibilities."

The agency's charges were inartfully drafted. As best can be determined, appellant was charged with having received health and life insurance coverage and annuity payments from August 20, 1972 through December 30, 1980, to which she knew or should have known she was not entitled. Appellant was also accused of falsification of two employment applications dated June 25, 1979 and November 8, 1980 respectively, wherein she denied receiving an annuity. The agency maintained that these acts severely discreted appellant's honesty and integrity as an employee (Agency File, Tabs 2 and 4).

To sustain an action under 5 U.S.C. chapter 75, subchapter II, the agency must prove, by a preponderance of the evidence, that appellant committed the acts alleged. 5 U.S.C. 7701(c)(1)(B); *Parker* v. *Defense Logistics Agency,* 1 MSPB 489, 498 (1980). "Preponderance of the evidence" is defined in the Board's regulations as "that

degree of relevant evidence which a reasonable person, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R. 1201.56(c)(2) (1979). The agency's evidentiary burden extends to every element of the charges. *In re Van Sciver,* 1 MSPB 94 (1980).

Each charge requires a showing of intent to defraud the Government. *See Yoder* v. *Department of the Air Force,* MSPB Dkt. No. DC075209063 (1981); *Melillo* v. *United States Postal Service,* MSPB Dkt. No. DA075209240 (1981); *Allen* v. *United States Postal Service,* MSPB Dkt. No. AT075299011 (1980). Circumstantial evidence is generally utilized to prove intent, which, being a state of mind, can seldom be proved directly. *Tucker* v. *United States,* 624 F.2d 1029, 1033 (Ct. Cl. 1980); *see also Scanland* v. *U.S. Army Test and Evaluation Command,* 389 F. Supp. 65, 75 (D. Md. 1975).

Certain facts are not in dispute. Appellant received a General Notice of Reduction in Force dated March 30, 1971, due to the disestablishment of the Department of the Army's New York Procurement Agency, where she had been employed as an EAM Project Planner (Agency File, Tab 6A). She received a Specific Notice dated March 30, 1972, advising her that she would be separated due to reduction in force, effective May 30, 1972. In that letter, she was advised that she was eligible for a retirement annuity on the basis of discontinued service and given an explanation of discontinued service retirement (*Id.* at Tab 6B). The actual effective date of her separation was June 29, 1972 (*Id.* at Tab 6C).

On May 8, 1972, appellant had applied for a discontinued service annuity (*Id.* at Tab 6D). Her annuity was effec-

tive June 30, 1972, and continued through December 30, 1980 (*Id.* at Tab 6E; Agency H.E. 3-5).[1] Effective August 20, 1972, she received a career appointment by reinstatement with the agency (Agency File, Tab 1). On January 9, 1981, the agency contacted the Office of Personnel Management ("OPM") concerning her entitlement to a discontinued service annuity after her appointment (Agency H.E. 3). By letter dated April 2, 1981, OPM informed appellant that she was in receipt of an overpayment in the amount of $21,300.49 (Agency H.E. 4).

It was brought out that:

> Upon her application for a discontinued service annuity, Ms. Hester's health benefits enrollment was transferred to the U.S. Civil Service Commission, Bureau of Retirement, Insurance and Occupational Health, (now Office of Personnel Management) effective June 29, 1972. Deductions for that coverage were withheld from her annuity. Upon her reinstatement, she enrolled in the identical health benefits plan, without advising the agency that she was receiving health benefits as a retiree, as well. She did not cancel her coverage as a retired employee, and was therefore covered by two health benefits programs, which is prohibited by 5 C.F.R. 891.103 (a)(1).
>
> Additionally, upon her separation from the New York Procurement Agency on June 29, 1972, Ms. Hester's Federal Employee Group Life Insurance coverage was terminated. Life insurance coverage was continued into retirement without further cost to the appellant, effective with her discontinued

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[1] Reference to "H.E.———" is to hearing exhibits.

service retirement. However, upon reinstatement, she completed an SF-176 *Election, Declaration or Waiver of Life Insurance Coverage* dated August 22, 1972 electing regular insurance coverage as an active employee. Ms. Hester's employment at FDA terminated her entitlement to an annuity under 5 C.F.R. 870.601.

(Agency File, Tabs 6F-H; Tr. 132).[2]

In addition, the agency established that:

> During the period she was receiving annuity payments, Ms. Hester submitted an SF-171 *Personnel Qualifications Statement* dated June 25, 1979 for the position of "EAM Project Planner," GS-362-7, Vacancy Announcement Number RO II-179-79. In response to Item No. 34: "Do you receive, or do you have pending application for retirement or retainer pay, pension or other compensation based upon military, civilian, or District of Columbia Government service?," the applicant answered "no".
>
> Ms. Hester also completed and submitted an SF-171 *Personal Qualifications Statement* dated November 8, 1980 for the position of Administrative Officer, GS-341-11/12, Vacancy Announcement Number RO II-891-80K. In response to Item No. 34, which asked the identical question to the one on her application of 6/25/79, she again answered "no". In fact, she was still receiving civil service retirement annuity payments at the time of this false statement and continued to do so through December 30, 1980.

(Agency File, Tabs 6I-J; Tr. 153).

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[2] Reference to "Tr.———" is to a page in the transcript.

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A hearing was convened at appellant's request, during which she testified that she intended to return the annuity checks and "held onto them for a while" (Tr. 138). However, upon receiving notice of a $21,300.49 overpayment, appellant could only afford to repay $300.49, albeit she eventually reduced her liability to $19,500 (Tr. 145-7). It is, therefore, reasonable to infer that she negotiated the checks and converted the money to her own personal use.

Appellant alleged that her superivsor(s) had failed to implement her "frequent requests to return the checks" (appeal form at Item 11). She testified that such requests were made in 1974 to her former immediate supervisor, Murray Labile, Administrative Officer, who is now deceased (Tr. 72, 138-144, 163-4). She also testified to having made two separate requests for assistance in 1976 and 1977 respectively, to Edward Camp, the succeeding supervisor,[3] and from 1976 to 1979, "periodically mentioned the situation to Mr. Camp" (Tr. 143-4, 163-4). The checks were not returned because she was waiting for one of the supervisors to provide her with a "special form," which the supervisors indicated had to be completed before the checks could be returned. (*Id.*) Finally, appellant asserted that she telephoned the U. S. Civil Service Commission (now OPM) on two separate occasions in 1974 to notify them of her receipt of the checks; she was told "not to do anything with the checks," that the Commission was in the process of reorganizing and that "they would get back to me" (Tr. 140, 159-160).

Assuming, without finding, that appellant's testimony is credible, she still cannot prevail. Appellant provided

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[3] Mr. Camp was Administrative Officer of the Newark District Office from 1976 to 1980 (Tr. 111).

no justification for negotiating the checks and converting the money to her own personal use. Such conduct, which occurred on a regular and recurring basis for over seven years, is not indicative of an honest mistake or simply neglect. Rather, it demonstrates her intent to permanently deprive the government of money, to which she admittedly knew she was not entitled. Absent receipt of the overpayment notice, it is more than likely that appellant would not have voluntarily repaid the annuity payments. Under these circumstances, the agency has met its evidentiary burden, *see* U.S.C. 7701(c)(1)(B), regarding the annuity checks.

Concerning appellant's dual health and life insurance coverage, the record is barren of evidence showing that she attempted to cancel her coverage as a retiree after her reinstatement. Nor is there any evidence that she ever advised the agency or OPM about her dual coverage. As a supervisor, and also as an employee with about 32 years of Federal service (Appeal File, SF-50; Tr. 7, 57), appellant knew or should have known she was not entitled to such coverage. She maintained that deductions were made from salary and annuity checks for this coverage (Tr. 9, 180). This is irrelevant, since she was not entitled to the annuity checks. In any event, financial gain is not an element of this charge. *Cf. Affsa* v. *Department of Agriculture,* MSPB Dkt. No. BN07528010069 (1981). Accordingly, this charge is supported by pre ponderant evidence, and is, therefore, sustained.

As to the final charge, appellant denied intending to falisfy the employment applications dated June 25, 1979 and November 8, 1980, respectively. Appellant answered Item 34 in the negative on both applications "because, at the time that I filled out this application, I didn't realize

that this particular question pertained to receipt of annuities" (Tr. 137, 154). She claimed this was an honest mistake (Tr. 180-1).

The record, however, supports the agency's charge. When appellant was reinstated, she completed a Declaration of Appointee, SF-61B, dated August 20, 1972 (Agency H.E. 6). Item 8 on that document poses the same question that is contained in Item 34 of the employment applications (*Id.*). Appellant responded to Item 8 in the affirmative (*Id.*). She acknowledged understanding Item 8 and what her response to it should have been (Tr. 156-8). At the time she completed the employment applications, appellant was receiving annuity payments. Instead of retaining the checks, she negotiated them and converted the money to her own personal use. Item 34 unambiguously asks whether the applicant was receiving an annuity (Appeal File, Tabs 61-J). Given these circumstances, it is incredulous that appellant did not understand Item 34. Rather, I find that she answered the question in the negative on two occasions to conceal the fact she was receiving an annuity. Based on all the above, the agency has proven the final charge by the requisite degree of evidence.

The agency must also show that its disciplinary action would "promote the efficiency of the service," 5 U.S.C. 7513(a), *i.e.*, that there is a "nexus" between the sustained ground for the action and the agency's ability to carry out its mission and/or the employee's ability to accomplish the duties of her position. *Douglas* v. *Veterans Administration,* MSPB Dkt. No. AT075299006 (1980); *Doe* v. *Hampton,* 566 F.2d 265, 272 (D.C. Cir. 1977). Here, ample precedent exists for the conclusion that appellant's removal promotes the efficiency of the service.

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First, considerable deference must be given to an agency's exercise of discretion in determining what rules of conduct shall be required of its employees. *Rotolo* v. *Merit Systems Protection Board,* 636 F.2d 6 (1st Cir. 1980).

It has been held by the courts that an agency is justified in concluding that an employee who falsifies official documents cannot be trusted to handle sensitive information in the course of her duties. *Alers* v. *United States,* 633 F.2d 559 (Ct. Cl. 1980). In addition, an agency is justifiably concerned with its representation for honesty and integrity, and is entitled, if it wishes, to establish the most rigorous standards of honesty and accuracy regarding representations made in matters of official interest. *Birnholz* v. *United States,* 199 Ct. Cl. 532 (1972).

The Board has held that an agency has an unchalleable right to expect its employees to be truthful in all matters of official business. *Giesler* v. *Department of Transportation,* MSPB Dkt No. DE075299018 (1980). Numerous courts as well have held that a federal agency cannot be expected to retain in its employ a person who demonstrates a lack of veracity in official statements. *See e.g., Philips* v. *Bergland,* 586 F.2d 1008, 1011 (4th Cir. 1978); *Williams* v. *Boorstin,* 24 EPD paragraph 31, 283 (D.C. Cir. 1980). The Board has explicitly upheld discharges of employees falsifying internal, job-related documents in *Melillo* v. *United States Postal Service,* MSPB Dkt No. DA075209240 (1980).

In the instant case, appellant's conduct was, in essence, falsification of employment applications and dishonest concealment, enabling her to obtain annuity payments and dual health and life insurace coverage for over seven

years, which she either knew or should have known she was not entitled. As an Office Services Supervisor, GS-7, her duties entailed, among other things, oversight of the procurement and imprest fund operations of the Newark District Office (Tr. 53, 59, 104-107). Since the offenses had been uncovered, appellant's supervisors have had grave doubts concerning appellant's reliability, trustworthiness, and ethical conduct (Tr. 54-5, 104-7). Therefore, there is a rational relationship between appellant's offenses and the agency's ability to carry out its mission and, thus, the agency has met its burden under 5 U.S.C. 7513(a).

A final, distinct, determination must now be made as to whether the particular punishment imposed in this case is appropriate to the offenses proven. The Board has the authority to mitigate a penalty when it determines that the agency-imposed penalty is clearly excessive, disproportionate to the sustained charge, arbitrary, capricious, MSPB Dkt. No. AT075299006 (1981). Even when the Board finds an agency penalty to be excessive, the corrected penalty to be specified by the Board is not necessarily one which in the Board's view would be the "best" or "most reasonable" penalty, but rather the maximum penalty that it would find to be "within the parameters of reasonableness." *Davis* v. *Department of Treasury,* MSPB Dkt. No. NY075209075 (1981).

The first consideration in a *Douglas* analysis is the seriousness of the offenses. Here, appellant's misconduct had a significant effect on her reputation for honesty and integrity thereby damaging confidence in her ability to carry out her job. There was no evidence that appellant was subjected to disparate treatment in terms of severity of penalty.

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In appellant's favor are the facts that she was a long-term employee (Tr. 7, 57), who possessed an otherwise favorable employment record (Tr. 57), and displayed enthusiasm while on the job (Tr. 134-136). However, considering the gravity of the offenses and the other factors set forth above, and noting that considerable deference is accorded to an agency's exercise of discretion in disciplining its employees, *Douglas, supra; Rotolo, supra,* the punishment meted out to appellant was within the parameters of reasonableness.

DECISION

The removal action is hereby affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on Dec. 1, 1981 unless a petition for review is filed with the Board thirty-five (35) calendar days after the issuance of this decision or the Board reopens the case on its own motion.

Any party to this appeal or the Director of the Office of Personnel Management may file a petition for review of this decision with the Merit Systems Protection Board. The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable law, rule, or regulations.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1717 H St. N.W., Washington, D. C. 20419, no later than thirty-five (35) calendar days after issuance of this decision.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to establish that:

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(a) New and material evidence is available that despite due diligence was not available when the record was closed; or

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. 7703(b)(1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any *final* decision of the Board provided the petition is filed no more than thirty (30) calendar days after finality.

For the Board:

ARTHUR JOSEPH
Presiding Official

APPENDIX E

Final Order of the Merit Systems Protection Board

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number NY07528110345

HAZEL A. HESTER,

v.

DEPARTMBENT OF HEALTH AND
HUMAN SERVICES.

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on October 27, 1981, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petition.*

This is the final order of the Merit System Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

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* *See Weaver* v. *Department of the Army*, 2 MSPB 297, 299 (1980) (holding that the Board will not undertake a full review of the record on appeal where the petitioning party has not demonstrated an error with specific references to the record).

Appendix E

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

Dated: July 6, 1983
Washington, D.C.

KATHY W. SEMONE for
Robert E. Taylor
Secretary